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# FAIR POLITICAL PRACTICES COMMISSION

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SACRAMENTO

THOMAS McCLINTOCK,

Case No. 03CS01177

Petitioner,

V.

KEVIN SHELLEY, in his capacity as  
SECRETARY OF THE STATE OF  
CALIFORNIA,

Respondent.

FAIR POLITICAL PRACTICES COMMISSION,

Respondent-Intervenor.

## INTRODUCTION

Petitioner is an official candidate for Governor in the upcoming October 7, special statewide election, who is requesting that this Court undo a filing by Petitioner in connection with his candidacy.

As a State Senator, Petitioner *twice* voted for a law that rewards candidates with the opportunity to include a Candidate Statement in the ballot pamphlet sent to voters prior to an election *if* the

1 candidate agrees to abide by voluntary expenditure limits during the election. (RJN, Exs. A and B.)<sup>1</sup>  
2 The law also requires such candidates to indicate their intention regarding expenditure limits when they  
3 file their Candidate Statement of Intention (Form 501) with the Secretary of State.<sup>2</sup> That same law  
4 allows just one limited circumstance for a candidate to change his or her designation: if the candidate  
5 has declined the expenditure limits in the primary election but did not in any event exceed those limits,  
6 he or she may accept the expenditure limits for the general election.  
7

8 Now a candidate for Governor, Petitioner asks the Court to set aside the laws approved by the  
9 voters in Proposition 34 and which he helped enact by asking this Court to allow him to do what the  
10 law forbids – amend his Form 501 to change his intentions regarding expenditure limits. The Petition  
11 does not allege authority exists under the law to allow amendment in cases other than as described  
12 above. Petitioner does not dispute that he declined to abide by the expenditure limits when he filed his  
13 Form 501. Petitioner does not dispute that agreeing to abide by the expenditure limits is a prerequisite  
14 to having his Candidate Statement published in the ballot pamphlet. Petitioner does not even deny that  
15 the law provides amendment only for the limited circumstance described above, which does not apply  
16 to this election.  
17

18  
19 It comes as no surprise, then, that the Petition assiduously avoids any discussion whatsoever of  
20 the relevant statutory authority governing the predicament in which candidate McClintock has placed  
21 himself. Having either failed to read the Form 501 which he filled out and signed as a candidate, or  
22 merely because he changed his mind (the Petition is unclear on this point), candidate McClintock seeks  
23

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24  
25 <sup>1</sup> All citations to documents that are attached as exhibits to the Request for Judicial Notice, filed concurrently  
26 herewith, shall be identified as “RJN, Ex. \_\_.”

27 <sup>2</sup> One must be careful to avoid confusing the two similarly named documents. A candidate is *required* to file a  
28 “Candidate Statement of Intention,” which is the Form 501 produced by the FPPC and filed with the Secretary of State in  
this instance. The “Candidate Statement” referred to in the Petition and in this Opposition is a statement authored by a  
candidate and included in the ballot pamphlet *under certain conditions*.

1 this Court’s assistance in rewriting the law that prohibits the very type of amendment he desires. In a  
2 Petition that can only be described as vague, candidate McClintock asserts an abuse of discretion claim  
3 where no discretion exists in the hopes of undoing his binding declination to abide by the expenditure  
4 limits which, in turn, precludes him from providing a statement in the ballot pamphlet. Despite  
5 assertions that the First Amendment applies, the Petition is devoid of facts showing that Petitioner is  
6 entitled to any relief from this Court.  
7

## 8 **STATEMENT OF FACTS**

### 9 **A. General Provisions of the Political Reform Act**

10 Under the Political Reform Act (“Act”),<sup>3</sup> candidates and committees must file periodic  
11 statements disclosing contributions received and expenditures made in connection with election  
12 activities. (§ 84100, et seq.) For statements filed by candidates for elective state office, their controlled  
13 committees, and committees that support or oppose state candidates and ballot measures, the Secretary  
14 of State is the filing officer. (§ 84215.) Prior to receiving any contributions, a state candidate also must  
15 file with the Secretary of State a Candidate Statement of Intention (Form 501). (§ 85200.) Section  
16 81010 imposes the following duties on filing officers:  
17  
18

- 19 “(a) Supply the necessary forms and manuals prescribed by the Commission;  
20 (b) Determine whether required documents have been filed and, if so,  
21 whether they conform on their face with the requirements of this title;  
22 (c) Notify promptly all persons and known committees who have failed to  
23 file a report or statement in the form and at the time required by this title;  
24 (d) Report apparent violations of this title to the appropriate agencies; and  
25 (e) Compile and maintain a current list of all reports and statements filed with  
26 this office.”  
27

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28 <sup>3</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All statutory references are to the Government Code unless specified otherwise.

1 Proposition 34 added provisions allowing candidates for elective state office to accept voluntary  
2 expenditure limits. (§§ 85400-85403). Candidates who accept the limits are designated in the ballot  
3 information materials and may purchase space there for a statement. (§§ 85600-85601.)

4  
5 Candidates must indicate whether they accept the voluntary expenditure limits when filing the  
6 Candidate Statement of Intention (Form 501) pursuant to section 85200. (§ 85401(a).) A candidate  
7 who does not accept the expenditure limit in a primary (or special) election may amend the Form 501  
8 within 14 days of the primary (or special) election to accept the limit for the general (or special runoff)  
9 election. (§ 85401(b).) There is no other provision allowing a candidate to amend the Form 501 to  
10 change his or her designation with regard to the voluntary expenditure limits.  
11

12 **B. The Authority of the Commission in Interpreting and Applying the Act**

13 The Commission has primary responsibility for the impartial, effective administration of the  
14 Political Reform Act. (§ 83111.) Section 81003 provides that the Act should be liberally construed to  
15 accomplish its purposes. Section 83112 empowers the Commission to adopt, amend, and rescind  
16 regulations to carry out the purposes and provisions of the Act. To fulfill its mission, the Commission  
17 is required to prescribe forms for reports, statements, notices and other documents required by the Act.  
18 (§ 83113.)  
19

20 Any person, including a filing officer and a candidate for elective state office, may request the  
21 Commission to issue an opinion or the Commission staff to render written advice with respect to his or  
22 her duties under the Act. (§ 83114; Regs. 18320 – 18326 and 18329.) Written advice by the  
23 Commission to the Secretary of State, in his role as filing officer, was rendered by the Commission,  
24 advising him that a candidate for elective state office may not amend his or her Form 501 to accept  
25 voluntary expenditure limits, once rejected. (*See* Commission Advice Letters, Nos. A-03-178 and  
26 A-01-285; *see also* *Boling* Advice Letter, No. A-01-136, attached to RJN, Exs. C, D and E,  
27  
28

1 respectively. ) No such advice or assistance was requested by Petitioner with respect to his duties  
2 under the Act.

### 3 **ARGUMENT**

#### 4 **A. The FPPC's Broad Authority Under the PRA Requires This Court to Give** 5 **Great Deference to the Commission's Interpretation of the Act**

6 The electorate granted the FPPC broad powers under the Political Reform Act. The FPPC has  
7 "primary responsibility for the impartial, effective administration and implementation" of the Act.  
8 (§ 83111.) The Commission has extensive regulatory powers: the powers to adopt, amend and rescind  
9 rules and regulations to carry out the purposes of the Act. (§ 83112.) In addition, pursuant to  
10 Government Code section 83114, any person may request the Commission to issue an opinion or  
11 written advice with respect to his or her duties under the Act and the Commission shall render such  
12 advice.  
13

14  
15 The courts of appeal have recognized that "the FPPC's interpretation of statutes and regulations  
16 in the area of its expertise must be given great weight in [judicial] analysis." (*Brown v. Fair Political*  
17 *Practices Com.* (2000) 84 Cal.App.4<sup>th</sup> 137, 150; *Californians for Political Reform Foundation v. Fair*  
18 *Political Practices Com.* (1998) 61 Cal.App.4<sup>th</sup> 472, 484 (holding that the FPPC's expertise requires  
19 that its view of a statute or regulation it enforces "is entitled to great weight unless clearly erroneous or  
20 unauthorized").)

#### 21 22 **B. The Secretary of State Is Not Vested with Discretion to Accept Petitioner's** 23 **Amended Candidate Intention Statement**

24  
25 Proposition 34, adopted by the voters in November of 2000, established a comprehensive  
26 contribution limit scheme and other provisions to the Act allowing candidates for elective state office,  
27 such as Governor, to accept voluntary expenditure limits. (§§ 85300 – 85321; 85400-85403.) Together  
28 these sections provide an overall framework that seeks to limit the corruptive influence of large

1 donations and supports a system that reduces the need for large campaign war chests. As originally  
2 enacted by Proposition 34, section 85401 requires each candidate to file a statement of acceptance or  
3 rejection of the voluntary expenditure limits when the statement of intention is filed. (§ 85401, subd.  
4 (a).) The next year, section 85601 was amended by Senate Bill 34. Section 85601 provides that a  
5 candidate who has accepted the voluntary expenditure limits may purchase the space to place a  
6 statement in the state ballot pamphlet. (§ 85601, subd.(a).) As amended by Senate Bill 34, the  
7 Secretary of State “may not include in the state ballot pamphlet a statement from a candidate who has  
8 not voluntarily agreed to the expenditure limitations set forth in Section 85400.” (§ 85601, subd. (b).)  
9 The statute confers no discretion on the Secretary of State on this point.  
10

11  
12 Once the Form 501 is filed, section 85401 speaks to the amendment of that form and provides  
13 just a single circumstance for amendment:

14 “(b) Any candidate for elective state office who declined to accept the voluntary  
15 expenditure limits but who nevertheless does not exceed the limits in the primary,  
16 special primary, or special election, may file a statement of acceptance of the  
17 expenditure limits for a general or special runoff election within 14 days following  
the primary, special primary, or special election.”

18 It is a common rule of statutory construction that when a law specifically enumerates certain  
19 conditions or exceptions, that list is exclusive. (*Clark v. Burleigh* (1992) 4 Cal.4<sup>th</sup> 474, 489 (Elections  
20 Code provision specifically listing permissible contents of a candidate statement gives rise to negative  
21 implication that the Legislature did not intend the statement to contain any other material); *FNB*  
22 *Mortgage Corp. v. Pacific General Group* (1999) 76 Cal.App.4<sup>th</sup> 1116, 1133 (where exceptions to a  
23 general rule are specified by statute, other exceptions are not to be implied or presumed, absent a  
24 discernible and contrary legislative intent), citing [Wildlife Alive v. Chickering](#) (1976) 18 Cal.3d 190,  
25 [195](#); and [Andrus v. Glover Construction Co.](#) (1980) 446 U.S. 608, 616-617; *Garson v. Juarique*  
26 (1979) 99 Cal.App.3d 769, 774 (stating that under the doctrine of expression unius est exclusio alterius,  
27  
28

1 expression of one thing in a statute implied intentional exclusion of the omitted thing). ) Accordingly,  
2 under its authority to interpret provisions of the Act, the FPPC has advised on numerous occasions that,  
3 except for the limited circumstance described in subdivision (b) above, a candidate may not amend his  
4 or her Form 501. (*Daniels-Meade* Advice Letter, No. A-01-285; *Boling* Advice Letter, No. A-01-136.)  
5 Fulfilling the duties under the Act, Commission staff reiterated this conclusion in the *Daniels-Meade*  
6 Advice Letter, No. A-03-178, when the Office of the Secretary of State inquired whether this advice  
7 applied in the context of the election for Governor to be held on October 7, 2003. In that letter, the  
8 Secretary of State’s office was advised that “[b]ecause nothing in the Act would allow a candidate to  
9 amend the expenditure limit designation in connection with a recall election,” the amended filing of the  
10 Form 501 should be returned to the candidate. (*Daniels-Meade* Advice Letter, No. A-03-178, at p. 3.)

13         Petitioner does not dispute that when he filed his Form 501 on July 24, 2003, for the 2003  
14 election for Governor, he declined to abide by the voluntary expenditure limits. Petitioner does not  
15 dispute that there will not be a primary or special primary for the October 7 election. Accordingly, the  
16 strict elements providing for amendment under subdivision (b) of section 85401 have not been met and  
17 the Secretary of State was advised that Petitioner’s attempted amendment of his Form 501 was without  
18 effect. Contrary to Petitioner’s mischaracterization that the Secretary of State “took it upon himself ...  
19 to determine that Petitioner ... had no right to communicate...,” the Secretary of State was compelled  
20 by the strict letter and spirit of the law to reject the amended Form 501. (Pet. Points & Authorities, at  
21 p. 1.)

24         The FPPC’s construction of section 85401 is based on the plain language of the statute and  
25 sound principles of statutory construction, an assessment which is entitled to “great weight” by this  
26 Court. Coupled with the emphatic commandment of section 85601, the Act provides no discretion to  
27 the FPPC, the Secretary of State or this Court to allow Petitioner to amend his Form 501.  
28

1 **C. The Petition is Void of Facts and Law Establishing a First Amendment Violation**

2 The Petition's prayer for relief is based on the mere assertion, without more, that Petitioner has an  
3 absolute right to publish a candidate statement in the ballot pamphlet. Undaunted by a lack of statutory  
4 or case law authority to support his claim, Petitioner recites First Amendment platitudes only  
5 tangentially related to the issues at hand. Stripped of these distractions, the Petition cites *no* authority  
6 for the right to unqualified access to the ballot pamphlet, discusses *none* of the applicable statutes  
7 governing candidate statements and obfuscates the nature of the interests at stake. Where a  
8 complainant fails to explain how a statute violates any constitutional provision, the State Supreme  
9 Court has said a court is entitled to reject "such a pro forma claim." (*Clark v. Burleigh, supra*, 4 Cal.4<sup>th</sup>  
10 at pp. 481-482.)

11  
12  
13 Petitioner's conclusory allegation that because his proposed ballot statement concerns "pure  
14 political speech" he is inoculated from legal regulation is without merit. (*Clark v. Burleigh, supra*,  
15 4 Cal.4<sup>th</sup> at pp. 482-483; Petition, at p. 5.) In *Clark*, the California Supreme Court warned, quoting the  
16 United States Supreme Court, that the determination that the candidate's statement is protected speech  
17 is merely the beginning of the inquiry:

18  
19 "… Even protected speech is not equally permissible in all places and at all times.  
20 Nothing in the Constitution requires the Government freely to grant access to all  
21 who wish to exercise their right to free speech on every type of Government  
22 property without regard to the nature of the property or to the disruption that might  
23 be caused by the speaker's activities. …" (*Id.*, at p. 482, *quoting Cornelius v.*  
24 *NAACP Legal Defense & Ed. Fund* (1985) 473 U.S. 788, 799-800.)

25 At issue in *Clark* were restrictions in the Elections Code relating to the content of candidate ballot  
26 statements. The statutory provisions provided that such a statement had to be limited to the candidate's  
27 name, age, occupation, and a brief description of the candidate's own background and qualifications,  
28 and must not refer to those of other candidates for the office. (*Id.*, at p. 456.) An incumbent superior  
court judge prepared a statement that contained attacks on his opponent in his bid for reelection and the



1 local registrar of voters sought court intervention to determine whether the statement complied with the  
2 law. In upholding the law against the judge’s First and Fourteenth Amendment challenges, the court  
3 applied a multi-part test. (*Id.*, at p. 484.)

4  
5 The Court began its analysis by observing that because the judge sought access to the pamphlet  
6 only with respect to his statement, the judge was seeking only “limited access” to the government  
7 property – the ballot pamphlet. (*Id.*, at p. 485.) The Court then turned to the critical question of  
8 whether the ballot statement was a public or non-public forum, and examined the Legislature’s intent in  
9 the recent legislation creating the statement. (*Id.*) The Court concluded that analysis by observing:

10  
11 “... [I]n the statutory candidate’s statement the Legislature has created a forum  
12 that is limited both as to speakers – nonpartisan candidates for local judicial office  
13 – and as to topic – the candidates’ own qualifications for the office. **There is no**  
14 **unlimited, ‘public’ component, and hence no designated public forum.** It is  
15 true that in their statutory statements the candidates are speaking *to* the public – or  
16 at least to the members of the public who are registered voters residing in the  
17 county. But a forum is defined by its speakers not its listeners... .” (*Id.*, at pp.  
18 490-491; italics in original; bolding added.)

19  
20 In such a forum, the Court observed the applicable rule: the State may reserve the forum for its  
21 “intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and  
22 not an effort to suppress expression merely because public officials oppose the speaker’s view.” (*Id.*, at  
23 p. 491; internal quotations omitted.) In so holding, the Court emphasized that the State may limit the  
24 class of individuals to whom the forum will be offered:

25  
26 “Implicit in the concept of the nonpublic forum **is the right to make distinctions**  
27 **in access on the basis of subject matter and speaker identity.** [citation  
28 omitted.] Specifically, a speaker may be excluded from a nonpublic forum if he  
wishes to address a topic not encompassed within the purpose of the forum, **or if**  
**he is not a member of the class of speakers for whose especial benefit the**  
**forum was created.”** (*Id.*; internal quotations and citations omitted; emphasis  
added.)

29  
30 Finding the Elections Code statutes did not transcend any constitutional protections, the Court  
observed that the statute also was viewpoint-neutral. “There was neither claim nor evidence that the

1 Legislature was so motivated when it adopted section 10012.1 and the statute necessarily operates in an  
2 evenhanded fashion.” (*Id.*, at p. 494.)

3         Examining sections 85401 and 85601 in their greater context of the contribution limitation  
4 scheme created by the Proposition 34 and the public policy goal of preventing the influence of  
5 excessive contributions, we see that the Legislature and voters have reasonably provided a content-  
6 neutral carrot to a class of candidates who agree to abide by voluntary expenditure limits. (§§ 81001;  
7 85401; 85601.) By providing an incentive to abide by limits, the Legislature and voters attempt to  
8 prevent election costs from spiraling out of control that lead to the pressure to raise greater and greater  
9 sums, by reasonably providing a limited non-public forum at low-cost for these candidates to address  
10 the voters. The timeline for making the selection of whether to abide by expenditure limits reasonably  
11 sets that time at the filing of the Form 501 when the candidate enters the race, and provides stability  
12 and predictability for all candidates by limiting the circumstances under which the candidate may  
13 change his or her designation.  
14  
15  
16

17         In light of the Supreme Court’s pronouncements in the *Clark* case and the undisputable fact that  
18 the statutory scheme at issue is content-neutral and reasonable, sections 85401 and 85601 are beyond  
19 challenge under the First Amendment.

20 **D.       The Petition Fails to State a Violation of Petitioner’s Due Process Rights**

21         Petitioner’s procedural due process claim hinges on proof of two elements: (1) a protectible liberty  
22 or property interest; and (2) a denial of adequate procedural protections. (*Foss v. National Marine*  
23 *Fisheries Service* (9<sup>th</sup> Cir. 1998) 161 F.3d 584, 588.) As shown above, Petitioner cannot establish a  
24 constitutional right to change his mind and his Form 501 expenditure limit selection nor can he show a  
25 constitutional right to publish a ballot statement regardless of that selection. Nevertheless, even if such  
26  
27  
28

1 rights existed, Petitioner cannot show Respondent Secretary of State had any duty to advise him on the  
2 law.

3 First, Petitioner makes no claim that the selection made on his Form 501 with respect to voluntary  
4 expenditure limits would have been different at the time had he been given a warning about the  
5 provisions of section 85601. Moreover, no government proceedings caused Petitioner to lose the ballot  
6 statement to which he claims he was entitled. Rather, it was *Petitioner's* own failure to make the  
7 choice to accept the limits and receive the statement.  
8

9 Finally, as for the notion that Petitioner cannot be expected to know the law in this area, the  
10 legislative history of the enactment of Senate Bill 34 in the 2001 legislative session reveals that  
11 Petitioner himself *voted twice* for the law which he seeks now to avoid. (RJN, Exs. A and B.)  
12 Whatever notice requirement may exist in this context, Petitioner was uniquely positioned like almost  
13 no other candidate on the ballot to receive *actual* notice of the law. In any event, the Petitioner is  
14 presumed to know the law. (*Anderson v. Superior Court of Fresno* (1995) 11 Cal.4<sup>th</sup> 1152, 1161.)  
15

#### 16 **E. Petitioner Is Not Entitled to the Relief Sought**

17 Even assuming the Petition stated grounds justifying relief, Petitioner is not entitled to his  
18 demand that this Court order the Secretary of State to publish his candidate statement. (Pet., at p. 5.)  
19

20 As established above, the Secretary of State acted without discretion in performing his duties  
21 under the Act. Nevertheless, even if discretion were found to exist, this Court is not entitled to direct  
22 an administrative agency on *how* to exercise its discretion. (*See, e.g., Cummings v. Civil Serv.*  
23 *Comm'n.* (1995) 40 Cal.App.4<sup>th</sup> 1643, 1652.) At most, the Court could order the Secretary of State to  
24 hold a hearing on Petitioner's claims but cannot limit or control in any way the discretion legally vested  
25 in the Secretary of State. (Code Civ. Proc. § 1094.5, subd. (f).) In any event, Petitioner seeks no such  
26 relief. (Pet., at p. 5.) Accordingly, the Petition must be denied.  
27  
28

1 **F. The Petition Should be Denied Because it Fails to State a Cause of Action and**  
2 **is Vague and Ambiguous**

3 In seeking a writ of mandamus, Petitioner is obliged to file a memorandum of points and  
4 authorities. (Local Rules for the Sup. Ct. of Cal., Co. of Sacto., Rule 2.01, subd. (C).) Petitioner also  
5 has the burden of demonstrating why the Secretary of State or the FPPC is wrong. (*Fukuda v. City of*  
6 *Angels* (1999) 20 Cal.4<sup>th</sup> 805, 817.) The *absence* of the memorandum may be construed as an  
7 admission that the petition is nonmeritorious and therefore may be dismissed. (Cal Rules of Ct. 313,  
8 subd.(a); Local Rules for the Sup. Ct. of Cal., Co. of Sacto., Rule 1.04.)

10 The grounds listed in Code of Civil Procedure section 430.10 for complaints in ordinary civil  
11 actions also constitute the grounds for objection in an administrative mandamus proceeding. (*See* Code  
12 of Civ. Proc. § 1109.) Thus, the petition may be denied where the petition is ambiguous, unintelligible  
13 or does not state facts sufficient to constitute a cause of action. (Code Civ. Proc. §§ 430.10, subds. (e)  
14 and (f), 430.30.) A complaint that alleges nothing more than conclusions of law is subject to dismissal.  
15 (*Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531.)

17 While the Petition may *technically* comply with local rules insofar as a points and authorities is  
18 attached to the Petition, the FPPC submits that the documents submitted by Petitioner are so lacking in  
19 substance as to constitute a *de facto* failure to comply with the local rules. Worse, once stripped of its  
20 conclusory allegations, the Petition is vague both in terms of the harm alleged and the relief sought:

- 22 1. Petitioner assails the Secretary of State for failing to accept his amended Candidate  
23 Statement but does not even *mention* a desire to file an amended document in his  
24 prayer for relief.
- 26 2. The Petition complains of a lack of hearing provided by the Secretary of State, but is  
27 completely silent as to the facts that would have been presented at such a hearing or  
28 how they would have borne on the law.

3. Petitioner decries the lack of a hearing to consider his mysterious “facts” yet seeks no such order from this Court that he be provided such a hearing.

4. Petitioner *concludes* that Respondent Shelley abused his discretion as the filing officer but *fails* to cite any statutory authority giving the Secretary of State such discretion.

5. Petitioner *concludes* he should be allowed “by law” to file an amended Form 501 and yet is entirely, and tellingly, silent in his brief as to the existence of any such authority.

6. Petitioner *alleges* there “were no explicit written rules” giving notice of the consequences of his own actions despite the fact that Petitioner *twice voted for the law of which he now claims to be unaware*.

In short, the Petition is woefully inadequate and fails as a matter of law to state grounds upon which relief may be granted.

### CONCLUSION

For the reasons and pursuant to the authorities cited hereinabove, the FPPC respectfully requests this Court deny the Petition in its entirety.

Dated: August \_\_\_\_, 2003

Respectfully submitted,

FAIR POLITICAL PRACTICES COMMISSION

By: \_\_\_\_\_  
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Fair Political Practices Commission